

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD DEANDRE LOCKE,

Defendant.

) No. CR18-132 RAJ
)
) REPLY BRIEF IN SUPPORT OF
) MOTION FOR COMPASSIONATE
) RELEASE PURSUANT TO 18 U.S.C.
) § 3582(C)(1)
)
) **Noted: May 22, 2020**
)
) **Oral Argument with Mr. Locke
present by video requested**

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I. SUMMARY

Edward Locke filed a motion for compassionate release because he suffers from a constellation of medical problems that elevate his risk for severe complications from Covid-19. His motion is supported by findings made in his Presentence Report, medical records, expert declarations, medical literature, statutory authority, and case law. The Government has not even attempted to rebut the expert declarations, cites no opposing medical literature, and cannot credibly argue that Mr. Locke does not currently face an elevated risk. The Government fails to even address a number of medical conditions that elevate his risk (namely hypertension and chronic kidney disease). And it wrongfully trivializes the ailments that it does address (severe obesity, diabetes, and severe obstructive sleep apnea). It makes no comment at all on the fact the United States Probation Office has already approved of Mr. Locke's release plan, and that plan – residency in a single-occupancy apartment maintained by his family's church in the same neighborhood where Mr. Locke excelled on pretrial supervision – could hardly be more robust.

Nevertheless, the Government opposes the motion, contending that Mr. Locke presents some sort of generalized danger that is not at all reflected by the facts of the case and is in fact contraindicated by Mr. Locke’s performance on pretrial supervision. And it wrongly contends – contrary to the bulk of the district court rulings on the issue – that an outdated policy statement prevents this Court from even ordering release. When making this argument, the Government does not acknowledge the most recent rulings rejecting its position. The Government next argues that relief should not be granted because it claims that the danger to Mr. Locke and others at the SeaTac Federal Detention Center is speculative because the BOP has not yet reported a Covid-19 infection at the FDC. But risking an outbreak at the FDC is untenable, given the likelihood of harm that Mr. Locke will suffer if infected.

1 Finally, the Government suggests that relief should not be granted because in its
 2 view Mr. Locke has not yet served enough time. But Mr. Locke should not have to risk
 3 severe complications or death to serve a sentence that this Court imposed when it had no
 4 reason to believe that a pandemic would create a substantial risk that Mr. Locke will not
 5 be able survive that sentence unharmed. And this Court can impose a similarly severe
 6 sentence in any event, subjecting Mr. Locke to house arrest for the remainder of the
 7 originally served custodial sentence, to be followed by a supervised release term that was
 8 even greater than originally imposed. The Court should exercise its discretion and grant
 9 Mr. Locke's motion.

10 **II. ARGUMENT IN REPLY**

11 As argued in Mr. Locke's motion, once Mr. Locke has shown eligibility for
 12 compassionate release, the Government bears the burden of justifying that the originally
 13 imposed sentence remains appropriate in the light of the changed circumstances. Dkt.
 14 774 at 20. The Government does not contest this standard. Its response, however, failed
 15 to satisfy its burden.

16 **A. Medical conditions that render an inmate especially vulnerable to
 17 Covid-19 complications can constitute extraordinary and
 compelling reasons for relief.**

18 The Response argues that Covid-19 alone does not create an extraordinary and
 19 compelling reason to grant compassionate release. Response at 12 (dkt. 787). This,
 20 however, is not an argument that Mr. Locke has ever made. Rather, he argues that two
 21 factors together, the existence of the pandemic combined with his risk of harm brought
 22 about by a number of preexisting medical conditions, provide a sound basis for relief.
 23 The Honorable John C. Coughenour has endorsed this view: "when an inmate has health
 24 conditions that make them significantly more vulnerable to COVID-19, that likewise may
 25 constitute an extraordinary and compelling circumstance." *United States v. Dorsey*, No.
 26 CR16-0138-BLW-JCC, 2020 WL 2562878, at *2 (W.D. Wash. May 19, 2020) (finding

1 also that defendant's "vulnerability to COVID-19 is a serious medical condition that
 2 constitutes an extraordinary and compelling circumstance warranting compassionate
 3 release under the U.S. Sentencing Guidelines"). The *Dorsey* court cited medical
 4 conditions were obesity, cardiovascular disease, and diabetes. *Id.* The Government's
 5 response does not cite this case.

6 **B. The Government's has failed to rebut Mr. Locke's showing of
 7 compassionate release eligibility. The Government's response is
 8 inadequate because it leaves critical expert testimony unrebutted,
 9 ignores a number of Mr. Locke's medical conditions that render
 him particularly vulnerable to the virus, and improperly
 minimizes the rest.**

10 **I. The Court should reject the Government's invitation to
 11 overlook Mr. Locke's severe obesity**

12 Mr. Locke provided numerous references in his motion that supported the
 13 undisputable truth that obesity is one of the strongest predictors of severe corona virus
 14 disease. One of these references was a New York Time Article entitled "*Obesity Linked*
 15 *to Severe Coronavirus Disease, Especially for Younger Patients,*" Motion at 5 (NYT
 16 article available at Dkt. 773-3). The Government apparently overlooked this article and
 17 its "younger patients" qualifier because it invites the Court to conclude that "Defendant
 18 at age 45 is far too young" to be at high risk. The Government's response does not
 19 appreciate that, while youth alone does not create an increased risk, preexisting
 20 conditions can do so regardless of age.¹ While it is true that old age in and of itself can
 21 render someone particularly vulnerable to the virus, so too can any one of the many
 22

23 ¹ Representative quotes from the Government's response are: "Defendant at age 45 is far
 24 too young to fit in the one of the most prominent and important risk categories"; "It is
 25 well-documented that people 65 and older are at greater risk from the virus, but Defendant
 26 is a good two decades away from that threshold"; and "Given his age, and the current
 facts at FDC SeaTac, the defendant has not bet [sic] his burden." Dkt. 787 at 13-14.

1 preexisting illnesses from which Mr. Locke suffers. The many authorities cited in Mr.
 2 Locke's motion more than adequately document this.

3 Next, the Government invites that Court to dismiss Mr. Locke's obesity concern
 4 because the CDC has defined severe obesity as having a BMI of 40 or higher, and
 5 maintains that Mr. Locke is under that cutoff, making no citation to any record. Mr.
 6 Locke's BMI is at this precise instant is unknown, but as detailed in his motion at n. 18,
 7 Mr. Locke's BMI has hovered either just below or just above this cutoff for years. The
 8 values reflected by the cited records there, are, in chronological order ranging from
 9 January 24, 2018 to January 20, 2020: 39.47, 38.91, 38.22, 37.94, 38.63, 39.47, 40.18,
 10 and 38.6. Dkt. 774 at 8, n.18. The idea that Mr. Locke does not have an elevated risk by
 11 virtue of obesity, simply because it is possible that he may be just below the definition
 12 cut-off on any given day, is absurd.

13 The Government makes no response to the fact that the medical records show that
 14 Mr. Locke suffers from a form of obesity that makes him especially vulnerable to Acute
 15 Respiratory Distress Syndrome. Dkt. 774 at 7-8. And the Government makes no attempt
 16 to counter the cited cases noting that "Courts have granted compassionate release to
 17 incarcerated individuals with obesity and sleep apnea because those conditions place
 18 them at high risk for serious complications due to COVID-19." *United States v. Delgado*,
 19 No. 3:18-CR-17-(VAB)-1, 2020 WL 2464685, at *4 (D. Conn. Apr. 30, 2020) (collecting
 20 cases); dkt. 774 at 7.

21 Because of all this, the Government's response has failed to rebut Mr. Locke's
 22 showing of eligibility for CR release based on obesity.

23 **2. *The Government failed to rebut eligibility based on***
 24 ***diabetes.***

25 Mr. Locke supported his CR motion with the declaration of Dr. Marc Stern, M.D.
 26 who reviewed Mr. Locke's recent BOP medical records and concluded that Mr. Locke's

1 diabetes was being poorly controlled within the FDC. Dkt. 774 at 11; dkt. 774-7. Dr.
 2 Stern concluded that Mr. Locke's poorly controlled glucose levels placed Mr. Locke at
 3 an especially heightened risk. *Id.* And this conclusion was echoed in the abstract by
 4 another declaration, that of Dr. Steven Edelman, M.D., dkt. 774 at 9-10; dkt. 774-6. The
 5 conclusion that the FDC was not adequately addressing Mr. Locke's medical needs was
 6 further supported by Mr. Locke's treatment provider, Advanced Registered Nurse
 7 Practitioner Melissa Stanley. Dkt. 774 at 18; dkt. 774-12. Despite this, the Government
 8 erroneously asserts that "much of the evidence to [the current difficulties in managing his
 9 diabetic condition] comes from Defendant's self-report." Dkt. 787 at 13.

10 The Government submitted no opposing evidence, by expert declaration or
 11 otherwise, to counter the assertions made by Dr. Stern, Dr. Edelman or ARNP Stanley.
 12 Instead, the Government's response attempts to shift the blame upon Mr. Locke,
 13 declaring (without any citation to any record) that "it is unknown to what extent the
 14 defendant is compliant with treatment..." Dkt. 787 at 13. If there was something in the
 15 record that would support that idea that Mr. Locke's negligence is responsible for BOP's
 16 difficulties in managing Mr. Locke's diabetes, one presumes the Government would have
 17 cited it. There is no such indication, and the record actually suggests that opposite, since
 18 ARNP Stanley noted that Mr. Locke had been compliant with his diabetes treatment when
 19 not in custody. Dkt. 774-12. The Government's unfounded speculation is irrelevant in
 20 any event, since regardless of cause, if his glucose levels are spiking (and the medical
 21 records show that they are)², he is at an especially heightened risk. To highlight the
 22 Government's error in logic, one would not dismiss a patient's elevated risk brought
 23 about by obesity by saying, "Well, this is really your fault. Why don't you lose some

24
 25 ² See Declaration of Marc Stern at ¶ 4 (dkt. 774-7); compare BEMR 2019-20 Medical
 26 Records at page 103 (showing a glucose level of 158 mg/dL on January 16, 2020, shortly
 after his arrival at the FDC) with *id.* at page 2 (showing a glucose level of 447 mg/dL on
 April 21, 2020, his most recent reading from the FDC) (dkt. 774-1).

1 weight?" Even if Mr. Locke's glucose levels were not spiking, he would still have an
 2 elevated risk, since, as noted by Dr. Eldeman, an individual who suffers from type II
 3 diabetes is more prone to infection by virtue of a compromised immune system brought
 4 about by the diabetic condition: "The risk of complications from COVID-19 is
 5 substantially increased for those with a history of poor blood glucose control, regardless
 6 of the type of diabetes, because the immune system is compromised and individuals will
 7 not be able to fight off any type of infection, including COVID 19." Dkt. 774 at 10; Dkt.
 8 774-6). The Government ignores this as well. Regardless of the precise nature of the risk
 9 brought about by diabetes, it cannot seriously be questioned that Mr. Locke's risk would
 10 be reduced if he were released to an environment where he could practice social
 11 distancing.

12 **3. *The Government ignores the evidence showing that sleep***
 13 ***apnea elevates one's risk of severe complications.***

14 The Government's response devotes only two sentences to Mr. Locke's sleep
 15 apnea. Dkt. 787 at 14. The first sentence is: "Defendant *appears to have sleep apnea*, and
 16 claims this makes him more vulnerable to the virus." *Id.* (emphasis added). This is quite
 17 an understatement, given that a medical provider described Mr. Locke's condition as one
 18 "of the most severe cases of apnea I have ever seen." Motion at 17 (dkt. 774). The
 19 Government's second and final sentence directed to sleep apnea is, "However, sleep
 20 apnea is not identified by the CDC as a risk factor with the virus, and Defendant does not
 21 point to any reliable medical literature supporting this proposition." Dkt. 787 at 14. While
 22 the CDC may not have explicitly recognized sleep apnea as a risk factor, the remainder
 23 of the Government's statement is incorrect, since Mr. Locke cited both medical literature
 24 and his own medical records to document that sleep apnea can complicate and worsen
 25 his other conditions (namely chronic kidney disease, hypertension, and diabetes) that by
 26 themselves elevate his risk. Dkt. 774 at 17 nn. 38 and 39 and the accompanying text. The

Government's response ignores all this, as well as those cases that have granted release based on sleep apnea and other conditions that Mr. Locke has (e.g., obesity, hypertension, high cholesterol). See dkt. 774 at 7-8 (citing *Delgado, supra*, which collected cases).

4. *The Government fails to even address Mr. Locke's chronic kidney disease and hypertension, as well as the interplay among sleep apnea, diabetes, and chronic kidney disease.*

As recognized by the National Kidney Foundation and outlined in Mr. Locke’s motion, chronic kidney disease also elevates one’s risk for severe complications from the virus. Dkt. 774 at 16. The Government’s response is remarkable in that it does not address this condition at all: its response does not even contain the word “kidney.” Nor does the Government meaningfully address Mr. Locke’s hypertension, despite the fact that this condition too has been shown to be “independently associated with severe COVID-19.” *Id.*³ It acknowledges his hypertension only in a summary paragraph, providing no rebuttal regarding the impact of this condition. Dkt. 787 at 5. The Government also did not rebut (or even acknowledge) the arguments that Mr. Locke made – supported by medical literature and his own medical records – that he faces a heightened risk because of the interplay among sleep apnea, hypertension, chronic kidney disease, and diabetes. Dkts. 774 at 16-17; 774-10, 774-11.

C. **The sentencing guidelines are neither exclusive nor binding on the Court.**

The Government’s takes the position that the Sentencing Commission’s policy statement on compassionate release remains controlling in the wake of the First Step Act. *See* Dkt. 787 at 8-9. The Government notes that “numerous courts” has so held, including a judge in this district. *Id.* at 9. This is accurate, but the dominant view is exactly the opposite: “a majority of the district courts have concluded that the ‘old policy statement

³ Citing Paul M. Palevesky, M.D., et. al, "Coronavirus disease 2019 (Covid-19): Issues related to kidney disease and hypertension, UpToDate (updated May 1, 2020).

1 provides helpful guidance, [but]. . . does not constrain [a court's] independent assessment
 2 of whether "extraordinary and compelling reasons" warrant a sentence reduction under §
 3 3852(c)(1)(A))." *United States v. Rodriguez*, 2020 WL 1627331, at *4 (E.D. Penn. Apr.
 4 1, 2020) (adopting majority view as "more persuasive"). Other courts have described it
 5 as a "vast majority." *United States v. Almontes*, 2020 WL 1812713, *3 (D. Conn. Apr. 9,
 6 2020) ("I agree with the vast majority of district courts: I can consider whether reasons
 7 other than the inmate's medical condition, age, and family circumstances amount to an
 8 extraordinary and compelling reason to reduce that inmate's sentence."); *see also United*
 9 *States v. Haynes*, No. 93 CR 1043 (RJD), 2020 WL 1941478, at *15 (E.D.N.Y. Apr. 22,
 10 2020) (stating that "[t]hese [majority] decisions reflect, to borrow a term, the right side
 11 of history on the crucial legal questions they consider" and concluding court has authority
 12 to "determine what 'Other Reasons' (as that term is used in Application Note 1(D))
 13 qualify as 'extraordinary and compelling' regardless of BOP's view on the matter and
 14 without having to await a someday-updating by the Commission of its unquestionably
 15 outdated policy statement"); *United States v. Maumau*, No. 2:08-cr-00758-TC-11, 2020
 16 WL 806121 (D. Utah Feb. 18, 2020) (rejecting the Government's invitation to "follow
 17 the minority of courts that have held that the Sentencing Commission's policy remains
 18 binding").⁴

19

20 ⁴ There are many more cases recognizing this is the majority opinion and following it,
 21 and yet more cases adopting the position without noting that it is the majority position.
 22 *See, e.g., United States v. Young*, No. 2:00-cr-00002-1, 2020 WL 1047815, at *6 (M.D.
 23 Tenn. Mar. 4, 2020) ("A majority of the district courts that have considered the issue have
 24 likewise held, based on the First Step Act, that they have the authority to reduce a
 25 prisoner's sentence upon the court's independent finding of extraordinary or compelling
 26 reasons"); *United States v. Etzel*, No. 6:17-CR-00001-AA, 2020 WL 2096423, at *3 (D.
 Or. May 1, 2020) ("The Court is persuaded by the reasoning of numerous other district
 courts and holds that it is 'not constrained by the BOP Director's determination of what
 constitutes extraordinary and compelling reasons for a sentence reduction.'") (quoting
Young, supra); *United States v. Perez*, 2020 WL 1180719, at *2 (D. Kan. Mar. 11, 2020)
 ("[A] majority of federal district courts have found that the most natural reading of the

1 The Government begins its discussion by citing *Dillon v. United States*, 560 U.S.
 2 817 (2010) for support. Dkt. 787-8. But *Dillon* has nothing to do with the statutory and
 3 guideline language at issue here. Nor did it involve an anachronistic policy statement
 4 that, as construed by the Government, would run afoul of an act of Congress, as so
 5 many courts have held. The Court in *Dillon* simply held that, in granting a sentence
 6 reduction based on a retroactive amendment to the crack cocaine base offense levels,
 7 the district court should comply with the specific and current policy directive of
 8 U.S.S.G. § 1B1.10 to “leave all other guideline application decisions unaffected.” *Id.* at
 9 821–22.

10 The Government nevertheless contends that, because the First Step Act changed
 11 only who could bring motions, there is nothing outdated in the policy statement. Dkt.
 12 787 at 9. Cases such as *Rodriguez* and *Maumau* explain in detail why that position is
 13 untenable. And the Response does not alert the Court that two judges in this district
 14 have ruled against the Government on this very issue.

15 As discussed in Mr. Locke’s Motion (dkt. 774 at 22), the Honorable Robert J.
 16 Bryan, in granting compassionate release, made clear that, notwithstanding the old policy
 17 statements, this Court has the discretion to “determine what qualifies, after appropriate
 18 analysis” and that the listing of examples of extraordinary and compelling reasons in
 19

20 amended § 3582(c) and § 994(t) is that the district court assumes the same discretion as
 21 the BOP director when it considers a compassionate release motion properly before it.”);
United States v. Pawlowski, No. CR 17-390-1, 2020 WL 2526523, at *5 (E.D. Pa. May
 22 18, 2020) (“Interpreting this application note in light of recent amendments to the
 23 compassionate release statute, a majority of the district courts that have considered the
 24 issue have concluded that a *court* (not just the BOP) may independently determine
 25 whether extraordinary and compelling reasons, other than the reasons listed in the policy
 26 statement, exist in a particular case”); *United States v. Hull*, No. 3:17-CR-132 (SRU),
 2020 WL 2475639, at *2 (D. Conn. May 13, 2020) (“As I and the majority of district
 judges have held, courts may make that determination independent of the BOP.”)

1 U.S.S.G. § 1B1.13 app. n.1(A)-(C) are not exclusive. *United States v. McPherson*, No.
 2 CR94-5708RJB, 2020 WL 1862596, at *4 (W.D. Wash. Apr. 14, 2020).

3 And the Honorable Ricardo M. Martinez reached a similar conclusion. “[T]he
 4 Court may determine that ‘extraordinary and compelling’ reasons may exist beyond those
 5 delineated by the commentary to U.S.S.G. § 1B1.13.” *United States v. Cosgrove*, No.
 6 CR15-230-RSM, 2020 WL 1875509, at *5 (W.D. Wash. Apr. 15, 2020) (quoting *United*
 7 *States v. Jepsen*, No. 3:19-CV-00073(VLB), 2020 WL 1640232, at *4 (D. Conn. Apr. 1,
 8 2020)).

9 As stated by other courts, “‘extraordinary and compelling’ circumstances may
 10 exist outside of those circumstances delineated by the U.S. Sentencing Commission,
 11 given the advisory nature of the guidelines, *United States v. Booker*, 543 U.S. 220 (2005),
 12 and their conflict with the statutory language of the First Step Act amendments.” *United*
 13 *States v. Rivera*, No. 3:17-cr-00159-6 (VLB), 2020 WL 1909227, at *4 (D. Conn. Apr.
 14 10, 2020).

15 Of the cases the Government does cite, none is persuasive. *See* Dkt. 234 at 8. First,
 16 the Government relies on *United States v. Washington*, No. 5:13-020-DCR, 2019 WL
 17 6220984 (E.D. Ky. Nov. 21, 2019)). That case is irrelevant, as the court in *Maumau*
 18 explained, because it addressed compassionate release requests based on subdivisions A
 19 through C of the Sentencing Commission’s policy—for medical condition, age, or
 20 caregiver status. *See Maumau*, 2020 WL 806121, at *3. *Washington* held only that
 21 rehabilitation alone does not constitute extraordinary and compelling reasons for
 22 compassionate release; it did not resolve the broader question of whether the catch-all
 23 provision in subsection D is limited to situations determined by BOP to meet the criteria.

24 The Government cites to *United States v. Fuller*, 17-CR-324-JLR, 2020 WL
 25 2557337 (W.D. WA. May 20, 2020), a decision from this district. That decision conducts
 26 no independent analysis of the issue, but simply refers to the court’s earlier decision in

1 *Riley v. United States*, No. C19-1522JLR, 2020 WL 1819838 at *8 (W.D. Wash. Apr.
 2 10, 2020). The analysis is not much deeper in *Riley*; the court went along with the
 3 decision of what it considered to be the majority of Ninth Circuit district courts on the
 4 issue (citing a total of four decisions) “[i]n the absence of contrary controlling
 5 authority[.]”⁵ *Id.* Furthermore, *Riley* was decided six weeks ago; the ever-growing chorus
 6 of courts joining the majority side on this issue – with detailed analysis supporting their
 7 conclusion – might well have convinced the *Riley* court to reach the opposite conclusion,
 8 just as the *Maumau* court remarked that another court might have reached a different
 9 conclusion on the issue, had it decided the matter with the benefit of all the decisions
 10 reached after it. *See Maumau*, 2020 WL 806121, at *6 (discussing *United States v.*
 11 *Shields*, No. 2019 WL 2645028, at *2 (N.D. Cal. June 27, 2019)). Even assuming the
 12 majority of decisions within the Ninth Circuit are what matter, since *Riley* was issued, at
 13 least three courts from the Ninth Circuit, two from this district, have joined the majority
 14 view. Beyond *McPherson*, and *Cosgrove*, *see, e.g.*, *United States v. Etzel*, No. 6:17-CR-
 15 00001-AA, 2020 WL 2096423, at *3 (D. Or. May 1, 2020) (and other decisions from the
 16 same court).

17 That leaves *United States v. Willingham*, No. CR113-010, 2019 WL 6733028
 18 (S.D. GA Dec. 10, 2019) (rejecting premise that courts would have discretion under
 19 Subdivision D to consider whether circumstances other than those listed in Subdivisions
 20 A through C amounted to “extraordinary and compelling” reasons), and *United States v.*
 21 *Garcia*, No. 4:05-cr-40098, 2020 WL 2039227 (C.D. Ill. Apr. 28, 2020). These cases do
 22 actually present the minority view, but as noted that view has been rejected by most
 23 courts. *United States v. Scott*, No. 17-CR-156, 2020 WL 2508894, at *8 and n. 3 (E.D.

24
 25 ⁵ There is nothing about Ninth Circuit law that would make the decisions of the district
 26 court in this Circuit any better a prediction of what the Ninth Circuit would ultimately
 hold than the decisions from district courts around the country.

1 Wis. May 15, 2020) (citing to *Garcia* and its concession that current policy statement is
 2 a “relic”; concluding that the policy statement “cannot be given controlling weight
 3 without placing it in serious tension, if not conflict, with the First Step Act”; as a result,
 4 the court refused “to give the BOP control over what constitutes an extraordinary and
 5 compelling reason” as would appear to be required under catchall portion of policy
 6 statement); *United States v. Chan*, No. 96-cr-00094-JSW-13, 2020 WL 1527895 (N.D.
 7 Cal. Mar. 31, 2020) (finding reasoning of *Willingham* and *Shields* unpersuasive and
 8 concluding “that it could – and would – apply Subdivision D to determine ‘whether any
 9 extraordinary and compelling reasons other than those delineated in’ the other
 10 subdivisions warrant a reduction in Chan’s sentence.”).

11 **D. The Government errs in asserting that Mr. Locke is not
 12 advancing an inability to practice self-care as an alternative basis
 13 for relief, relative to the catchall provision.**

14 In Section III.A.5 of his motion, Mr. Locke contended, with citation to authorities,
 15 that his inability to practice critical self-care provided a basis independent basis for relief.
 16 Dkt. 774 at 30-31. The Government overlooked this in its response, incorrectly asserting
 17 that Mr. Locke advanced no such argument. Dkt. 787 at 10. Because the Government
 18 failed to respond to this argument, no reply is necessary.

19 **E. The fact that no positive cases have yet to have been reported at
 20 the FDC is not a basis to withhold release. Both the courts and the
 21 BOP have rightly released individuals from institutions not
 22 known to be infected.**

23 The Government contends that relief is inappropriate because no known case has
 24 yet been reported at the FDC. It submitted the FDC’s most recent coronavirus response
 25 update, claiming that it documents the “extraordinary steps” that the BOP has undertaken.
 26 Dkt. 787 at 12; dkt. 787-1. While it is fortunate that there have not yet been any Covid-
 19-related deaths at the FDC, fortune is really all it is. There are gaping holes in the FDC
 protective measures, which are the same ones that were relied upon throughout all of

1 BOP facilities and have resulted in at least 59 deaths as of this writing.⁶ Other than new
 2 inmate arrivals, asymptomatic individuals (either inmates or staff) are not tested at all,⁷
 3 and given the daily shuffle of FDC staff and contractors, it remains probable that the virus
 4 will find its way into the institution if it has not already; when it does, Mr. Locke will be
 5 at extreme risk. *See* Declaration of Dr. Marc Stern at ¶¶ 6-10 (describing inability to
 6 practice social distancing in detention facilities) (dkt. 774-7); *see also* Motion at 31-34
 7 (describing meaningless nature of BOP's testing reports) (dkt. 774). And because the
 8 FDC can neither reverse Mr. Locke's chronic medical conditions nor provide him with a
 9 space that allows him to practice social distancing, there is little the FDC can do about
 10 this. The most recent BOP Coronavirus Response Update, which claims that the FDC is
 11 requiring inmates to maintain social distancing, is not accurate. *See* dkt. 787-1 at 2. The
 12 overwhelming majority of inmates housed at the FDC – including Mr. Locke⁸ – are
 13 sharing a cell so small that social distancing is impossible. If there is any debate about
 14 this, an evidentiary hearing should be held with BOP staff present so they can be cross-
 15 examined on the point.

16

17

18⁶ <https://www.bop.gov/coronavirus/> (visited May 22, 2020).

19⁷ Undersigned counsel requested discovery as to the details of the FDC's testing protocols
 20 and the percentages of FDC inmates and staff who have been tested via an email of May
 21 20, 2020. The Government has not yet provided any such percentages, or provided any
 22 information regarding the testing protocols beyond that described in the update that is
 23 attached to its response, dkt. 787-1. Undersigned defense counsel understands that
 24 Government's response to mean that the USAO has no more information than is relayed
 25 by that update.

26⁸ Undersigned counsel confirmed this with Mr. Locke in a telephone call on the date of
 27 this May 22, 2020. In fact, Mr. Locke shares a cell with an inmate who is charged with
 28 cleaning the common areas in the unit where Mr. Locke and his cellmate live. If proper
 29 cleaning protocols are not followed, the job that his cellmate holds could lead to
 30 contamination of Mr. Lock's shared cell.

1 Moreover, as noted in Section III.A.6 of the motion, a number of cases have
 2 recognized that district courts should not withhold compassionate release relief on the
 3 theory that the wolf is only approaching the door, but has not yet crossed the threshold.
 4 Dkt. 775 at 31-33. Because the Government did not address the cases cited in this section,
 5 no direct reply is needed. But an incongruity in the Government's position needs to be
 6 remarked upon, since the BOP has released individuals based on feared impact of the
 7 virus even when no known cases existed at the institution where the individual was
 8 housed.

9 The Compassionate Release Statute directs the Court to consider the sentencing
 10 factors set forth in 18 U.S.C. § 3555(a), which includes promoting respect for the law,
 11 providing just punishment for the offense, and providing medical care in the most
 12 efficient manner. 18 U.S.C. § 3553(a)(2)(B, C, D); 18 U.S.C. § 3582(c)(1)(A). This,
 13 coupled with the broad discretion vested with the Court in deciding when a grant of
 14 compassionate release is appropriate, *see, e.g., McPherson, supra*, allows this Court to
 15 consider the facts of other cases, which includes individuals who were released to home
 16 confinement under the Cares Act. *See, e.g., United States v. Stephenson*, No. 3:05-CR-
 17 00511, 2020 WL 2566760, at *7 (S.D. Iowa May 21, 2020) (“Several courts, including
 18 this one, also have held that sentencing disparities created by criminal law reforms can
 19 be considered as part of a compassionate release motion.”); *see also* Response at 11, 14
 20 (dkt. 787) (expressing concern about sentencing disparities and citing the Cares Act). The
 21 case of Paul Manafort warrants inspection.

22 Paul Manafort was released to home confinement based on medical conditions
 23 (other than age) that appear to be less serious than Mr. Locke's. He was sentenced to a
 24 72-month term of imprisonment, was released despite the fact that he did not meet BOP's
 25 time-served threshold for such release. Eileen Sullivan, Paul Manafort, “*Trump's Ex-*

1 *Campaign Manager, Released to Home Confinement,”* The New York Times (May 13,
 2 2020).⁹

3 Attached as Exhibit O is the letter his attorneys wrote to the BOP Director Michael
 4 Carvajal, requesting that release. The letter notes that Mr. Manafort suffered from high
 5 blood pressure, liver disease, and unspecified respiratory ailments. *See Letter to BOP*
 6 *Director at 2.* In contrast, Mr. Locke suffers from obesity, diabetes, kidney disease, severe
 7 obstructive sleep apnea, and high blood pressure (and more) (*see Motion*, dkt. 774 at 5-
 8 17). Given the greater number of ailments, Mr. Locke’s medication list is more extensive
 9 than Mr. Manafort’s, but Mr. Locke medications are similar to Mr. Manafort’s for the
 10 conditions that they share. Here is a comparative list, drawn from the chart that his
 11 attorneys provided in their letter to Director Carvajal:

PAUL MANAFORT’S MEDICATIONS	EDWARD LOCKE’S MEDICATIONS ¹⁰
HBP	HBP
Hydralazine 40 mg	Hydralazine 25 mg
Amlodipine 10 mg	Amlodipine 10 mg
Carvediol 50 mg	Losartan Potassium 100 mg
Lisinopril 40 mg	-

23 ⁹<https://www.nytimes.com/2020/05/13/us/politics/paul-manafort-released-coronavirus.html>

24
 25 ¹⁰ The medications and dosages listed in this chart can found at BEMR 2019-20 at pp. 29
 26 and 72 (Exhibit A of Motion, dkt. 774-1).

1	ANXIETY	ANXIETY
2	Buspirone 15 mg	Fluoxetine (Prozac) 20 mg
3		
4	ELEVATED CHOLESTEROL	ELEVATED CHOLESTEROL
5	Atorvastatin 20 mg	Atorvastatin 40 mg
6		

7 Mr. Manafort's case is similar to Mr. Locke's in so far as he was released from a
 8 BOP facility despite that fact that there were no reported cases at the time. *See* Letter to
 9 BOP Director at 1. Mr. Manafort's case is dissimilar to Mr. Locke's in that Manafort
 10 performed disastrously on pretrial release, being remanded into custody after being
 11 accused of witness tampering.¹¹ In contrast, Mr. Locke's final PTS report was entirely
 12 positive (dkt. 774 at 4). Given that Mr. Manafort was entitled to release due to health
 13 concerns brought about by the virus, so is Mr. Locke.

14 Having every advantage in life, Mr. Manafort chose a path of corruption driven
 15 by pure greed.¹² And once confronted with charges, he responded by trying to obstruct
 16 justice. In contrast, when Mr. Locke was confronted with his charges, he responded by
 17 eliminating his drug use, finding gainful employment, and complying with every release
 18 condition placed upon him. *See* PSR at ¶¶ 3, 133; Dkt. 774 at 4 (quoting PTS report).

20

21 ¹¹ Josh Gerstein, "Manafort jailed after alleged witness tampering," Politico (June 15, 2018).

22 <https://www.politico.com/story/2018/06/15/manafort-jailed-after-alleged-witness-tampering-648988>

24 ¹² Sharon LaFraniere, et al, "The Rise and Fall of Paul Manafort: Greed, Deception and Ego," The New York Times (August 12, 2018).

25 <https://www.nytimes.com/2018/08/12/us/politics/manafort-trump-trial.html?searchResultPosition=6>

1 Denying Mr. Locke release while providing it to Mr. Manafort would not promote
 2 respect for the law, but would fuel cynicism that a more lenient set of rules apply to
 3 privileged white-collar defendants, relative to individuals such as Mr. Locke who
 4 endured a disadvantaged upbringing.¹³ *Cf. United States v. Sample*, 901 F.3d 1196, 1201
 5 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1545, 203 L. Ed. 2d 746 (2019) (“noting the
 6 importance of ‘minimiz[ing] discrepancies between white- and blue-collar offenses, and
 7 limit[ing] the ability of those with money or earning potential to buy their way out of
 8 jail’” (brackets in *Sample*, quoting *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir.
 9 2006)).

10 Regardless of the comparison between white- and blue-collar defendants, one
 11 point is clear: BOP considers it appropriate to decrease prison populations both for the
 12 benefit of both remaining inmates and for the safety of high risk individuals, even when
 13 the facility currently has no reported Covid-19 cases. It does this at the same time that
 14 another arm of the Department of Justice urges this Court to reject compassionate release
 15 because a facility has no such cases. This Court should follow BOP’s lead in this regard,
 16 consistent with the cases cited at Section III.A.6 of the motion, see dkt. 775 at 32.

17 **F. The length of his incarceration period is not a basis to deny relief.**

18 The Government asserts that the Court should not exercise its discretion in
 19 releasing Mr. Locke because he has not served enough time. Dkt. 787 at 16, 18. But Mr.
 20 Locke should not have to risk death, a prolonged recovery, or permanent impairments so
 21 that he can perhaps complete a sentence that this Court imposed under a different set of
 22 circumstances than exists today. When the Court ordered its 62-month sentence, it
 23 assumed a functioning BOP in a pandemic-free world. The phrase “social distancing”
 24 was not then even part of the parlance. The Court could not have anticipated that Mr.

25

26¹³ See PSR ¶¶ 55, 105-100; Motion at 2 (dkt. 774).

1 Locke would be confined under circumstances that present a continuing risk to his health.
2 And Mr. Locke – when he waived his right to trial and elected to plead guilty – anticipated
3 serving his time at a facility that might allow for meaningful programming or
4 improvement. None of that is happening now of course, as he is locked down constantly.
5 And the Court can fashion a sentence that provides adequate punishment by ordering a
6 prolonged period of house arrest, followed by a lengthy term of supervised release, with
7 stringent conditions, including additional electronic home monitoring.

8 **G. Mr. Locke can be safely released.**

9 The Government tries to gin up arguments suggesting that Mr. Locke was among
10 the worst defendants sentenced in this case and that he presents an on-going danger as a
11 result. The Government reaches back to offenses so old that they don't score, it cites
12 "arrests that did not result in convictions" and even cites "seven additional driving
13 offenses" as supposed evidence of incorrigibility. Dkt. 787 at 4. It tries to brand him as
14 an "armed redistributor" and repeats a variation of this term often, in the hopes of biasing
15 the Court against him. All of this ignores the facts of the case, as set forth in the agreed-
16 upon plea statement and the PSR. Mr. Locke was engaged in street level sales. He was
17 not a major player here, and he never brandished his weapon or threatened anyone with
18 it. Dkt. 774 at 1-2; PSR ¶¶ 52-56. Defense Sentencing Memo at (dkt. 700); dkt. 774 at 1-
19 2. Even one of Mr. Locke's medical records – produced after he was sentence – document
20 that he kept this gun for his own protection because he had been shot multiple times
21 growing up. Dkt. 774 at 2 n. 4; dkt. 774-1 at p. 20.

22 Only the Court knows what it really thought of Mr. Locke, but the fact that it
23 imposed only a two-month sentence for the drug offense suggests that the 62-month
24 sentence was driven more by the mandatory minimum at play, as opposed to a belief that
25 Mr. Locke represented an on-going danger.

That Mr. Locke can be safely released is circumstantially demonstrated by the fact that the USPO has approved of his proposed release address. There is really no way his release plan could be stronger. He will be able to maintain social distance from everyone by virtue of the fact that he will be living in single-occupancy apartment. The apartment is maintained by his Church. And it is located in the same Beacon Hill neighborhood where he was safely supervised by the USPO for a year and half. The Government response does not acknowledge (or even comment on) the strength of this plan.

III. CONCLUSION

The Court should grant Mr. Locke's motion.

DATED this 22nd day of May, 2020.

Respectfully submitted,

s/ *John R. Carpenter*
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Attorney for Edward Deandre Locke